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83-874

No.

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Appellant,

vs.

TRACY COY POE,
Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

W. DeVier Pierson
Pierson Semmes Crolius and Finley
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 333-4000

James Patrick Quinn
Philip F. Cardarella
(Counsel of Record)
Katheryn J. Shields
1104 Oak Street
Kansas City, Missouri 64106
(816) 471-3100
Attorneys for Appellee

E. L. Mendenhall, Inc., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

I. Whether the Government is bound, under the doctrine of equitable estoppel or otherwise, by the concession and stipulation of its counsel at trial that a mistrial would preclude retrial of the Petitioner in a case where:

(a) Petitioner relied upon this representation in not objecting to an order of mistrial, and,

(b) would have objected to a mistrial if jeopardy did not attach and the case could be retried.

II. Whether this Court's decision in *United States v. Scott* precludes Petitioner from relying on 18 U.S.C., Section 3731 barring appeal of a District Court dismissal where the double jeopardy clause of the Constitution prohibits further prosecution when Petitioner did not seek a mistrial.

III. Whether the rule of *Oregon v. Kennedy* requiring a showing of prosecutorial misconduct intended to goad a Defendant into requesting a mistrial encompasses a case where, as here, Petitioner relied on the representations of the Government's counsel in not objecting to a mistrial and otherwise would have so objected.

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No.

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Appellant,

vs.

TRACY COY POE,
Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The United States District Court for the Western District of Oklahoma ordered a mistrial based on governmental misconduct on October 12, 1982. Thereafter, the same Court dismissed the indictment against Petitioner on November 5, 1982. The United States filed an appeal.

The United States Court of Appeals for the Tenth Circuit vacated the order and judgment of dismissal on July 25, 1983, and the case was remanded with directions to reinstate the indictment. Petitioner's Petition For Rehearing was denied September 28, 1983.

Both Orders of the District Court, the Opinion of the Court of Appeals, and the Order denying rehearing are attached in the Appendix.

STATEMENT OF JURISDICTION

The Court of Appeals for the Tenth Circuit granted the Government's appeal on July 25, 1983. Petitioner's request for rehearing was denied on September 28, 1983.

The United States Supreme Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

   > . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty or property, without due process of law; . . .

2. The Sixth Amendment to the United States Constitution provides in pertinent part:

   > In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . .

3. 18 U.S.C. §3731 provides in pertinent part:

   > In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution. . . .

4. Rule 615 of the Federal Rules of Evidence provides:

> Exclusion of Witnesses
>
> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

STATEMENT OF THE CASE

Petitioner was on trial with six codefendants for alleged violations of 18 U.S.C. Sec. 1955, 1952, 1084 and 2 —all related to gambling. As a result of misconduct by agents of the Federal Bureau of Investigation during the trial, the Trial Court declared a mistrial. Thereafter the Trial Court held that retrial was barred by both the Fifth Amendment prohibition against double jeopardy and the Sixth Amendment right of confrontation, and dismissed the indictment.

At the commencement of trial, the Trial Court had ordered all witnesses sequestered, pursuant to Rule 615 of the Federal Rules of Evidence. In opening statement, the Government indicated that it would call numerous FBI agents, including one who would testify as an expert on gambling organization and structure. Since such opinion testimony would be essential to establish the elements of a §1955 ("five or more") violation, the possible bias of the FBI against Petitioner—an outspoken critic—became most relevant.

On cross-examination, FBI Agent James M. Hawkins first denied (Tr. 723) but was later forced to admit (Tr. 742) that FBI agents had strip-searched Petitioner's fourteen year old daughter and female friend of the daughter while conducting a search of Petitioner's home. The impact of Agent Hawkins' forced admissions before the jury significantly undermined the credibility of the FBI. (Counsel for the Government stated on the record, "It made him look like an ass." (Tr. 818).)

Attorneys for the defendants would not have a chance to spring the same surprise on other agents. Agent Hawkins exited the courtroom, immediately alerted fellow agents waiting to testify (Tr. 748), and discussed his testimony in the presence of at least five prospective witnesses. (Tr. 764, 776, 782).

Upon discovery of this misconduct, counsel for Petitioner moved for *dismissal* of the charges. (Tr. 808). Counsel for other defendants requested a mistrial. At no time did Petitioner join in the request for mistrial. The Trial Court was scrupulous in keeping a clear record of that. (Tr. 808).

With all motions pending, the Trial Court sought the Government's position on the issue of retrial:

> "The Court: O. K., now, what—we better discuss these various alternatives. Granting a mistrial of this case would be the same as granting a motion to dismiss, do you agree? Jeopardy will attach in other words, if error is brought about, mistrial is brought about on behalf of the government, which it clearly would be in this case . . . That's the same as granting a motion for dismissal, do you agree?
>
> Mr. Ringer: Yes, I do." (Tr. 813-814).

The Trial Court then took both the motion to dismiss and the motion for mistrial under advisement and continued with the trial.

Thereafter, FBI Agent Errol Meyers (the case agent who had been allowed to remain in the Court while other witnesses testified), alerted FBI Agent Nanette Hittmeirer that she would be asked questions concerning a strip-search. (Tr. 1152). When this became known, some defendants—but not Petitioner—renewed their motions for mistrial. (Tr. 1155-1156). The Court took that motion under advisement, and recessed for the weekend.

On Tuesday, October 12, 1982, without further hearing or argument, the Court announced a mistrial. Although the motions to dismiss were still under advisement, additional motions to dismiss were filed, and the Court dismissed the indictment on November 5, 1982, citing both Fifth Amendment (double jeopardy) and Sixth Amendment (confrontation) grounds.

The Government appealed. The Court of Appeals for the Tenth Circuit heard that appeal and reversed the Trial Court. It is to that reversal that Writ of Certiorari is sought.

REASONS FOR GRANTING THE WRIT

The Writ presents novel issues arising under the 5th and 6th Amendments to the United States Constitution in a case where Government misconduct has made it impossible for Petitioner to obtain a fair trial. Unless the Writ is granted, the power of District Courts to assure criminal defendants of their constitutional rights will be severely circumscribed and this Court's recent decision in *Oregon v. Kennedy* will have been construed to deprive Petitioner of the otherwise available protection against double jeopardy in a case where Petitioner undisputably relied on the Government's representation that jeopardy would attach if a mistrial were granted.

The key issues presented in this case are whether the Government may concede and stipulate a point to a Trial Court and defendant without being bound by its concession, whether a defendant who does not request a mistrial may be retried when a Court declares a mistrial because of governmental misconduct and whether the Court of Appeals has jurisdiction under 18 U.S.C. §3731 to hear an appeal from a dismissal of an indictment following a mistrial that was not requested by the defendant.

I. The Government is bound either by equitable estoppel or otherwise by the concessions and stipulation of its counsel at trial that the declaring of a mistrial for governmental misconduct would preclude retrial of the Petitioner, when, acting in reliance on such statement the Trial Court ordered a mistrial and the Petitioner did not object to such order.

At trial, counsel for the Government conceded and stipulated that double jeopardy would prevent the retrial

of any defendants regardless of whether the Court granted either the request for mistrial or the request for dismissal:

> "The Court: O. K. now, what—we better discuss these various alternatives. Granting a mistrial of this case would be the same as granting a motion to dismiss, do you agree? Jeopardy will attach in other words, if error is brought about, mistrial is brought about on behalf of the government which it clearly would be in this case . . . . That's the same as granting a motion for dismissal, do you agree?
>
> Mr. Ringer: Yes, I do." (Tr. 813-814).

Following the order of mistrial (without objection by Petitioner) and subsequent dismissal. The Government reversed its position and appealed.

It is clear that both a Trial Court and a defendant must have the right to rely on concessions and stipulations by government counsel. *Santobello v. New York,* 404 U.S. 257 (1971). That is true regardless of whether the counsel for the Government is correct in his factual or legal position. *Swift & Co. v. United States,* 276 U.S. 311, at 331 (1927).

Nor may the Government agree to one position at trial and later reverse that position on appeal without depriving the defendant of due process. The Fifth Circuit recently considered this problem in *United States v. Hernandez,* 668 F.2d 824 (5th Cir. 1982). There the Government had stipulated to the standing of a defendant to raise a Fourth Amendment search question, and later sought to object to standing on appeal. The Fifth Circuit held that the Government could not withdraw its stipulation, since the defendant had the right to rely on that Government concession in making his record below.

Similarly, Petitioner had the right to rely on the Government concession on double jeopardy. Had the Government not conceded the double jeopardy issue, or had it sought to withdraw that stipulation prior to the Trial Court's ruling, both the Court and the Petitioner could have persued other options. The Court could have dismissed outright, or taken further evidence and reserved its ruling. The Petitioner—*who could not benefit from a mistrial unless retrial was barred*—would have actively opposed a mistrial ruling. The Government must not be allowed to mislead both the Court and Petitioner, and thereby gain the opportunity to regroup and try its case before a jury that has not witnessed its misconduct exposed.

II. The Court of Appeals was without jurisdiction under 18 U.S.C. §3731 to hear an appeal by the Government from the dismissal of an indictment following a mistrial ordered for governmental misconduct when Petitioner did not request a mistrial.

18 U.S.C. §3731 does not authorize the Government to appeal the dismissal of an indictment when such an appeal would conflict with the Fifth Amendment prohibition against double jeopardy.

Prior to *United States v. Scott*, 437 U.S. 82 (1978) that was interpreted to mean that no dismissal could be appealed that would require a retrial of the issues. *United States v. Jenkins*, 420 U.S. 358 (1974). *Scott* substantially altered that rule by allowing appeal of a dismissal following a mistrial *sought by the defendant*. Since most pre-dismissal mistrials are at the defendant's request, the *Scott* rule applies to most dismissals.

Not in this case. The Petitioner did not request the mistrial ordered by the Court, and so does not fall under the *Scott* rule. 18 U.S.C. §3731 does not give the Court of Appeals jurisdiction in such a case as this.

III. The Court of Appeals erred by applying the rule of Oregon v. Kennedy requiring a showing of prosecutorial misconduct intended to goad a defendant into moving for a mistrial, when Petitioner had not requested a mistrial and his retrial is barred by double jeopardy.

The Fifth Amendment prohibition against double jeopardy endows a criminal defendant with the right to have his charge determined in a single trial. When such a trial ends in mistrial, the appropriate rule to be applied toward possible retrial is that of "manifest necessity." *United States v. Jorn*, 400 U.S. 470 (1971). This is the rule unless "the defendant himself has elected to terminate the proceedings against him" by requesting a mistrial. Then—and only then—does the rule in *Oregon v. Kennedy*, 102 S.Ct. 2083 (1983) apply, requiring that a defendant who has successfully moved for mistrial to show that the prosecutor intentionally goaded him into doing so.

Petitioner never moved for mistrial nor did he join in any mistrial motion. Therefore, it was error for the Court of Appeals to apply the *Oregon v. Kennedy* rule to Petitioner.

Since there was no way to cure the prejudice to defendants from the violation of the sequestration rule, there was—at least—a "manifest necessity" to declare a mistrial. But an examination of the record reveals that Petitioner requested only outright dismissal. (Tr. 808). Since the actions of the government witnesses had allowed them to coordinate their stories and avoid surprise, a mistrial would not profit Petitioner. On the contrary, only the Government could profit from retrial before a fresh jury. That is why the Sixth Amendment required dismissal. *United States v. Marion*, 404 U.S. 307 (1971).

The Trial Court was insistent that each defendant clearly specify the relief he sought. (Tr. 808). Then the

Government conceded that—with regard to double jeopardy —a mistrial would be the equivalent of dismissal. (Tr. 813-814).

The Court took all motions under advisement. Following another incident of misconduct, and a three day recess, the Court reopened proceedings by declaring a mistrial, without opportunity for discussion or objection. Since the Court did not announce its intentions in advance there was no opportunity to object. See *Jorn, supra* at p. 487. But given the Government's previous concession there was no reason to object. Either way, Petitioner cannot be said to have requested a mistrial, so the Court of Appeals erroneously applied the harsher rule.

CONCLUSION

In conclusion, Petitioner requests the Supreme Court issue its Writ of Certiorari to the Court of Appeals for the Tenth Circuit to review the issues presented in this cause.

Respectfully submitted,

W. DeVier Pierson
Pierson Semmes Crolius and Finley
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 333-4000

James Patrick Quinn
Philip F. Cardarella
(Counsel of Record)
Katheryn J. Shields
1104 Oak Street
Kansas City, Missouri 64106
(816) 471-3100
Attorneys for Appellee

APPENDIX

(Filed October 12, 1982)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA
CR-81-130-W

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TRACY COY POE, et al.,
Defendants.

ORDER

The Court earlier determined that there had been a very serious violation of the rule sequestering witnesses in this case which may have, and likely did, affect defense counsel's right of cross-examination. The Court took under consideration motions for dismissal and for mistrial. It explained to counsel and the jury that the rule had been invoked and had been violated. The Court explained that the rule was a well recognized means of discouraging and exposing fabrication, inaccuracy and collusion. Among the reasons for this rule are:

(1) to insure, as far as possible, that each witness gives his individual recollections of the events in suit, unaffected by the testimony of other witnesses;

(2) to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial;

(3) to expose inconsistencies in witnesses' testimony.

Thereafter, the government produced another witness, a former FBI agent. She testified that before being called, but subsequent to the Court's above recited determination and admonition, an earlier witness for the government, yet another FBI agent, had consulted with her "generally" regarding what her testimony would be and what she should expect by way of cross-examination by defense counsel.

The government contends that because the latter agent was her supervisor and did not discuss his earlier testimony with her that this was permissible. However, such agent was in no way excepted from the rule and it appears that there is again a clear violation of the rule by one witness attempting to shape another witness's testimony, to affect that other witness's recollection of the events in suit, and perhaps to conceal inconsistencies in the witness's testimony.

The Court is now satisfied that there have been repeated violations of the rule of sequestration to such an extent that defendants are unable to receive a fair trial in these proceedings under the circumstances. The rule of sequestration is equally applicable to government witnesses as it is to defense witnesses. The Court cannot and will not tolerate what appears to be flagrant, perhaps even deliberate, attempts to violate the rule of sequestration. The purpose of the rule is to promote the search for the truth, and such purpose is defeated by violations such as have occurred in this case.

Accordingly, the defendants' Motion for Mistrial which was earlier taken under advisement and the defendants' Renewed Motion for Mistrial are GRANTED.

IT IS SO ORDERED this 12th day of October, 1982.

/s/ Lee R. West
Lee R. West
United States District Judge

(Filed November 5, 1982)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA
CR-81-130-W

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TRACY COY POE, et al.,
Defendants.

ORDER

Defendants have moved for an order dismissing the case with prejudice on the grounds that retrial is barred and jeopardy has attached because of prosecutorial over-reaching. The defendant Anna Mae Hines has both joined in the joint motion of the defendants and filed a separate motion on the ground of double jeopardy and the ground that the violation of her Sixth Amendment rights makes a fair trial impossible.

The government has filed a response in which it claims that it did not intentionally provoke a mistrial, that prosecutorial over-reaching may be committed only by the prosecutor and not its agents, and that the Agent Hittmeyer incident did not constitute a violation of Rule 615, F.R.Evid. The government seeks a factual hearing to determine if a second Rule 615 violation occurred.

Agent Hittmeyer was thoroughly cross-examined with respect to her discussion with Special Agent Errol Meyers regarding her prospective testimony. Based upon the facts in the record, the Court made a finding that the incident

was a serious violation of Rule 615, F.R.Evid., notwithstanding the government's contention that it was not a violation. The intent of the government must be ascertained from the actions which have taken place. An ex post facto hearing at this stage of the proceedings is neither required nor appropriate. Moreover, under the facts and circumstances before the Court, there is no question that the acts of the F.B.I. agent witnesses are attributable to the prosecutor.

The United States Supreme Court recently delineated the circumstances which will permit the defendant to interpose the defense of double jeopardy to a second prosecution where the first has terminated on the defendant's own motion for a mistrial. The circumstances which bar retrial are those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial. *Oregon v. Kennedy*, 102 S.Ct. 2083 (1982).

The Court must decide from all the facts and circumstances whether the prosecutorial misconduct in this case was so flagrant as to be tantamount to intentionally provoking the defendants into seeking mistrial. *United States v. Robuck*, No. 81-2157, slip op. (10th Cir., October 8, 1982).

The trial in this case had proceeded for one week before the mistrial was declared. The rule of sequestration had been invoked. On Thursday, October 7, 1982, James Hawkins, a special agent of the F.B.I., testified as to certain items seized pursuant to a search warrant at the residence of one of the defendants, Tracy Poe. On cross-examination, the counsel for one of the defendants questioned the special agent about a strip search of the defendant Poe's 15-year old daughter and another young

girl at the residence. The special agent did not recall the strip search. The special agent was impeached by the defense with his 302 report which reported the strip search.

A recess was declared and the F.B.I. agent witness went out into the hall and discussed his testimony, in particular the impeaching cross-examination, with a large number of the government's witnesses who had not yet been called to testify. The Court held a hearing outside the presence of the jury and the government witnesses admitted that they knew about the rule of sequestration and were aware that it had been invoked.

The defendants moved for a mistrial. The Court expressed its concern that the right to effective cross-examination may have been affected by the incident but took under advisement the defendants' motion for a mistrial. The government counsel agreed with the Court that a mistrial would be tantamount to dismissal for jeopardy reasons under these circumstances and would bar retrial. The Court admonished the jury with respect to the testimony of the tainted witnesses. The Court asked government counsel to caution its witnesses about the rule of sequestration and the effect that further violations could have. The trial proceeded.

Despite full knowledge of the rule and its importance to a fair trial, knowledge that the rule had been invoked, and knowledge that any further misconduct on the part of the government could lead to a mistrial or dismissal, the government violated the rule of sequestration again. This time, Special Agent Errol Meyers, after he had testified but before Special Agent Hittmeyer had testified, discussed Agent Hittmeyer's prospective testimony with her.

It should be noted that the offending actions in both incidents were not committed by persons unacquainted with the judicial process but by experienced agents of the F.B.I. who were well acquainted with the rule of sequestration of witnesses, its purpose, and its importance.

Such conduct cannot reasonably be considered inadvertent. It was either deliberate or such a callous disregard of the purpose and import of the rule and of the Sixth Amendment rights of the defendants as to be tantamount to an intentional provoking of the defendants into seeking a mistrial.

The defendants' valued right to complete the trial to a verdict by the jury sworn to try their case was destroyed by the agents of the government in the prosecution of this case. This right would be a hollow shell if the defendants were required to stand trial once again, where presumably the wrongful conduct complained of would only be rewarded.

The defendants' Sixth Amendment right to cross-examine witnesses, the cornerstone of a fair trial, has been seriously eroded by the acts of the government agents. There is no apparent way of restoring the right which has been lost.

Accordingly, for the above reasons, the defendants' Motions to Dismiss are GRANTED.

IT IS SO ORDERED this 5th day of November, 1982.

/s/ Lee R. West
Lee R. West
United States District Judge

SEPTEMBER TERM - September 28, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

Nos. 82-2437; 82-2438;
82-2439; 82-2440;
82-2441; 82-2442

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

TRACY COY POE, LEROY DALE HINES, CARLA FLORENTINE HINES, ANNA MAE HINES, PAUL E. NEAL, WILLIAM R. GIBBS,
Defendants-Appellees.

This matter comes on for consideration of the following:

1. Petitions for rehearing and suggestions for rehearing en banc filed by the appellees in cases numbered 82-2437, 82-2438, 82-2439, 82-2441 and 82-2442, together with motions for further oral argument;

2. Petition for rehearing filed by appellee in case No. 82-2440.

Although the appeal in 82-2443, U.S. vs. Edward E. Harma, was consolidated with the captioned appeals for procedural purposes, no petition for rehearing was filed in that case.

Upon consideration whereof, the panel that rendered the decision sought to be reheard denies all of the petitions for rehearing in the captioned cases and further denies the motion for further oral argument in Nos. 82-2437, 82-2438, 82-2439, 82-2441 and 82-2442.

The petitions for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing en banc are denied in cases numbered 82-2437, 82-2438, 82-2439, 82-2440 and 82-2441.

Howard K. Phillips, Clerk
By /s/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

Tenth Circuit
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

Howard K. Phillips
Clerk

Telephone
(303) 837-3157
(FTS) 327-3157

September 28, 1983

TO ALL COUNSEL

Re: Nos. 82-2437, 82-2438, 82-2439, 82-2440, 82-2441, 82-2442

United States of America
v. Tracy Coy Poe, et al

Dear Counsel:

Enclosed is a copy of an order entered today in the captioned cause.

Very truly yours,

Howard K. Phillips, Clerk
By /s/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

RLH: oac

Enclosure

cc: Mr. Williams S. Price, U.S. Attorney, Mr. Frank M. Ringer, Assistant, 4434 Federal Building, 200 N.W. 4th Street, Oklahoma City, OK 73102

Mr. David B. B. Helfrey, Mr. Robert E. Mydans, U.S. Department of Justice #601, 1125 Grand Avenue, Kansas City, MO 64106

Mr. Philip F. Cardarella, Mr. James P. Quinn, Peebles, Beaird & Cardarella, 1104 Oak Street, Kansas City, MO 64106

Mr. Carl Hughes, Mr. Michael Gassaway, Hughes, Nelson and Gassaway, 1501 N. Classen, #200, Oklahoma City, OK 73106

Mr. Daniel K. Zorn, Jackson, Hall & Zorn, 3315 Northwest 63d St., Oklahoma City, OK 73116

Mr. C. Michael Blessington, Blessington and Lacy, 412 N.W. 23d Street, Oklahoma City, OK 73103

Mr. Warren Gotcher, Gotcher, Gotcher and Taylor, P. O. "T", McAlester, OK 74501

Mr. Nicholas D. Garrett, P. O. Box 1904, Lawton, OK 73501

(Filed July 25, 1983)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 82-2437, -2438, -2439, -2440, -2441, -2442, and -2443

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

TRACY COY POE, LEROY DALE HINES, CARLA FLORENTINE HINES, ANNA MAE HINES, PAUL E. NEAL, WILLIAM R. GIBBS and EDWARD E. HARMA,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. CR-81-130-W)

Sheryle L. Jeans, Attorney, United States Department of Justice, Kansas City, Missouri (William S. Price, United States Attorney, Western District of Oklahoma, Oklahoma City, Oklahoma, David B. B. Helfrey and Robert E. Mydans, Attorneys, U.S. Department of Justice, Kansas City, Missouri, with her on the brief), for Plaintiff-Appellant.

Philip F. Cardarella (James Patrick Quinn and Katheryn Shields, with him on the brief), Kansas City, Missouri, for Tracy Coy Poe, Defendant-Appellee.

Warren Gotcher, McAlester, Oklahoma, Attorney for William R. Gibbs, Defendant-Appellee.

Nicholas Garrett, Lawton, Oklahoma, Attorney for Edward E. Harma, Defendant-Appellee.

(Michael Gassaway, Oklahoma City, Oklahoma, Attorney for Leroy Dale Hines, Defendant-Appellee.)

(Carl Hughes, Oklahoma City, Oklahoma, Attorney for Carla Florentine Hines, Defendant-Appellee.)

(Daniel K. Zorn, Oklahoma City, Oklahoma, Attorney for Anna Mae Hines, Defendant-Appellee.)

(Michael Blessington, Oklahoma City, Oklahoma, Attorney for Paul E. Neal, Defendant-Appellee.)

Before McWILLIAMS, DOYLE, and LOGAN, Circuit Judges.

McWILLIAMS, Circuit Judge.

In a three-count indictment, Tracy Poe, Leroy Hines, Carla Hines, Anna Mae Hines, Paul Neal, William Gibbs, Edward Harma, Donna Fogerty, and Mark Baron were charged in the first count with violations of 18 U.S.C. § 1955. Poe and Gibbs were also charged in a second and third count with violations of 18 U.S.C. § 1952 and § 1084. On the second day of a joint jury trial, Fogerty and Baron pled guilty to a violation of § 1084. After the fifth day of the trial, when the government was still presenting its case-in-chief, the district court, on motion of all the defendants, declared a mistrial. The basis for the mistrial order was the district court's finding that there had been "repeated violations" by government witnesses of the court's sequestration order entered before trial, pursuant to the provisions of Fed. R. Evid. 615.

Thereafter, all defendants jointly moved to dismiss the indictment on the ground that to attempt to retry the defendants would violate Fifth Amendment rights relating to double jeopardy. One defendant, Anna Mae Hines, also moved to dismiss on the grounds that there had been a violation of her Sixth Amendment rights relating to a speedy and public trial by an impartial jury and to confront adverse witnesses, including the right to fully and meaningfully cross-examine such witnesses. The district court

granted defendants' motions to dismiss, and dismissed the indictment. Pursuant to 18 U.S.C. § 3731, the government now appeals the district court's order of dismissal. We reverse.

At the outset, the claimed misconduct of the prosecutor, and more particularly the conduct of two government witnesses, should be examined in context.

Prior to the first witness being called, the government requested that all witnesses be sequestered, as permitted by Fed. R. Evid. 615. None of the defendants objected to such request. The district court granted the government's request and spoke as follows:

> The Court: All right. The rule has been invoked with regard to all of the witnesses except the case agent and the expert witnesses to remain outside the courtroom until such time as you are called as a witness in this case. You will also be admonished and instructed not to discuss your testimony with any other witness in the case.
>
> Now, I'll ask you gentlemen, if you will, to assist me in enforcing the rule since I am not acquainted with your witnesses.

How many witnesses, if any, were present when the district court made the foregoing comment is not known.

The mistrial was based on two alleged violations of the exclusion order by two FBI agents, assuming, of course, that the statement made by the court can be deemed an order. The first incident concerns agent James M. Hawkins. Agent Hawkins was the twenty-first witness called by the government, and the second witness to testify about the search of the Poe residence. Hawkins testified, *inter alia*, concerning his participation in the search of the Poe house, which was made over three years prior to the trial

of the case, pursuant to a search warrant. On cross-examination, Hawkins was asked if he had participated in a strip search of two young persons present at the Poe residence at the time of the general search of the premises. Hawkins stated that he did not recall any strip search. Hawkins was then confronted with a copy of an FBI report which indicated there had been such strip searches. Hawkins, when shown the report, stated that there may well have been strip searches, but that he personally did not participate in them and had no first-hand knowledge concerning them.

At a recess of court after the conclusion of Hawkins' testimony, Hawkins engaged in conversation with several other FBI agents who were waiting to be called as government witnesses. This conversation, which took place in a hallway, was overheard by defense counsel and promptly reported to the district court. The conversation was initiated by inquiry as to why Hawkins had been so long on the witness stand. In response to such inquiry, Hawkins stated that there had been some question as to whether there had been any strip searches at the Poe residence, and whether he had ordered such or participated in them. The conversation generally pertained to the strip search issue. In this regard, other government witnesses later testified that there were, in fact, two strip searches conducted at the Poe residence, and that nothing of an incriminating nature was discovered in either search. Neither of the persons strip-searched was named as a defendant in the present proceedings.

At the conclusion of the hearing into the Hawkins incident, which, of course, was conducted outside the presence of the jury, the defendants moved, *inter alia*, for a mistrial. The district court took the matter under advisement, instructed the jury that the violation of the ex-

clusion order by Hawkins could be considered by the jury in assessing Hawkins' credibility and the credibility of the others with whom he had conversed, and ordered the trial to continue.

The second alleged violation of the exclusion order involved former agent Nanette Hittmeirer. Ms. Hittmeirer participated in the searches of the residences of Carla Hines and Anna Mae Hines. A preceding witness had been asked on cross-examination whether there had been any strip searches at either of the Hines' residences. He testified that he had not participated in such a search. To dispel any possible inference that there had been strip searches at either of the Hines' residences, the government called Ms. Hittmeirer as its next witness and she testified, *inter alia*, that there was no strip search at either residence.

On cross-examination, Ms. Hittmeirer was asked if she had discussed her testimony with anyone *prior* to testifying. She answered that she had discussions with the lead government counsel and, more particularly, with a supervisory FBI agent as to possible areas of cross-examination. The supervisory agent had previously testified in the case, although his testimony was not the subject of any discussion between himself and Ms. Hittmeirer. Moreover, his earlier testimony did not in anyway pertain to the search of the Hines' residences. Further cross-examination established that the supervisory agent had advised Ms. Hittmeirer that she might well be questioned about possible strip searches at the Hines' residences. Ms. Hittmeirer stated that her conversation with the supervisory agent lasted about two to three minutes, and generally concerned areas about which she might be cross-examined.

It was at this juncture that the defendants renewed their motions for a mistrial based on what the defendants thought was a violation of the exclusion rule by Ms. Hitt-

meirer. The government's position was that Ms. Hittmeier had not, in fact, violated the court's exclusion order. In this connection, we note that the exclusionary order made by the district court forbade a witness from discussing his testimony, once given, with others. However, it makes no specific mention of whether a witness could discuss with another what possible areas he, or she, might be questioned about when called as a witness. In this latter regard, the order is unclear.

In any event, after hearing argument, the district court declined to order a mistrial, and the cross-examination of Ms. Hittmeirer continued to its conclusion. The trial then was recessed over a three-day week-end. On the following Tuesday the district judge, who apparently had been reconsidering the entire matter over the week-end recess, declared a mistrial without any further argument of counsel. Ten days later he reset the case for trial. The defendants then filed motions to dismiss, which were subsequently granted.

The district court's order declaring a mistrial was probably within its discretionary powers. There were, of course, other remedies available, but we are not prepared to hold that the order declaring a mistrial was an abuse of discretion. In reality, any present discussion of whether a mistrial order was proper is now academic. A mistrial was, in fact, declared and the jury discharged. We are unable to reinstate the aborted proceeding so that the trial can take up where it left off. Hence, the crucial issue, as we see it, is whether, a mistrial having been ordered at the defendants' request, a retrial is barred by either the Fifth or Sixth Amendments. We think not.

The basic reason given by the district court for dismissing the indictment was that to retry the defendants would violate the Double Jeopardy Clause of the Fifth

Amendment. Such is not our view of the matter. The general rule is that where, as here, a defendant requests a mistrial, the Double Jeopardy Clause does not bar retrial.* In Oregon v. Kennedy, 456 U.S. 667 (1982), the Supreme Court enunciated a "narrow exception" to the general rule. Such exception occurs where the mistrial is caused by prosecutional misconduct which is intended to subvert the protections afforded by the Double Jeopardy Clause and calculated to "goad" a defendant into moving for a mistrial. Prosecutorial misconduct which is merely harassing or overreaching, although sufficient to justify a mistrial, will not bar a retrial absent such intent. The facts of the instant case do not bring it within the narrow exception created by *Kennedy*.

Assuming that the intent of the government's witnesses is transferable to the prosecutor, there is absolutely nothing in the present record to indicate that, by their actions, either agent Hawkins or former agent Hittmeirer had an intent to "goad" the defendants into asking for a mistrial or to "subvert" the protection afforded by the Double Jeopardy Clause. Hawkins and Hittmeirer may well have been careless in their discussions with other agents, but, under

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*The one defendant, Poe, states that he did not actually move for a mistrial, and that he only moved for an outright dismissal of the indictment. It is true that after the inquiry into the Hawkins incident, Poe did argue for dismissal. However, other defendants did move for a mistrial, some for a dismissal also, as opposed to a mistrial, and others asked for an instruction concerning credibility which the district court did, in fact, give the jury. Be all that as it may, when the district court declared a mistrial, there was *no* objection from *any* defendant. Under the circumstances, we deem Poe's absence of any objection to be at least tacit, if not outright, approval. Further, the basis for the district court's eventual dismissal of the indictment was that intentional prosecutorial misconduct had provoked the defendants, and all of them, to seek a mistrial. We shall dispose of this appeal, then, on the same basis as the matter was presented to, and disposed of, by the district court. On the state of the record, we find no need to discuss the rule of "manifest necessity."

Kennedy, that is not enough. As concerns the double jeopardy argument, see United States v. Robuck, 690 F.2d 794 (10th Cir. 1982), where, in line with *Kennedy*, we said that when a mistrial is granted at a defendant's request, his retrial is not barred by the Double Jeopardy Clause unless the prosecutor's misconduct was intended to provoke defendant's motion.

One defendant, Anna Mae Hines, also sought dismissal on the alternative ground that to retry her would violate Sixth Amendment rights and the district court, in dismissing the indictment as to all defendants, based its dismissal on the Sixth Amendment also. In so doing, the district court opined that defendants' right to cross-examine "has been seriously eroded by the acts of the government agents." We fail to see how defendant's right to cross-examine at a retrial has been irreparably prejudiced by what occurred at the first trial. In fact, the entire matter of strip searches and cross-examination in connection therewith is, in our view, blown out of all proportion.

Agent Hawkins was uncertain as to whether there were strip searches made at the Poe residence. Other government witnesses established that there were, in fact, two strip searches conducted at the Poe residence, none of which disclosed any incriminating evidence. As concerns the search of the two Hines' residences, the evidence, so far at least, is that there were no strip searches conducted at either home. So, testimony concerning strip searches is of doubtful materiality.

In this regard, however, it was defendants' theory that government agents had been waging a "personal vendetta" against them, and that strip searches tended to prove that such was the case. We fail to see how proof of a strip search is proof that a "personal vendetta" was being waged

by government agents. Strip searches are not a novelty, and are often necessary in order to recover contraband or prevent the destruction of incriminating evidence. To retry the defendants would not violate any Sixth Amendment rights of the defendants. We fail to see any "adverse consequence" flowing from any possible violation of Sixth Amendment rights. See United States v. Morrison, 449 U.S. 361 (1981). Of course, the defendants understandably want to avoid any retrial, but that is insufficient.

We are not condoning the actions of the government's agents. Agent Hawkins did talk with other government witnesses regarding his testimony, and he should not have. Former agent Hittmeirer, before testifying, had talked with a supervisory agent concerning what she might be examined about. It is debatable whether Hittmeirer's conduct violated the exclusionary order. Whether either witness actually knew of the exclusionary order is not clear from the record. As indicated, the only exclusionary order in the record before us is general in nature, with no specific delineation of prohibited conduct. But as the district court itself observed at one point in the proceedings, to grant a mistrial and dismiss the indictment would not "punish" the two witnesses, but would only "punish" the public.

One final matter: the defendants point out that in resisting the motion for a mistrial, the prosecutor conceded that to declare a mistrial would necessarily require the court to later dismiss the indictment on double jeopardy grounds. Suffice it to say, that, apparently perceiving the error of its initial position, such is not the position of the government on appeal. In any event, we are not bound by any such misconception of the law.

The order and judgment of dismissal is vacated, and the case remanded with directions to reinstate the indictment.

(Filed October 11, 1983)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May Term - July 25, 1983

Before Honorable Robert H. McWilliams, Honorable William E. Doyle and Honorable James K. Logan, Circuit Court Judges.

No. 82-2437

(D. C. # 81-130-W)

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

TRACY COY POE,

Defendant-Appellee.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the order and judgment of dismissal of that court is vacated. The cause is remanded to the United States District Court for the Western District of Oklahoma with directions to reinstate the indictment.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

Office - Supreme Court, U.S.
FILED
MAR 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-874

In the Supreme Court of the United States

OCTOBER TERM, 1983

TRACY COY POE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars petitioner's retrial following the granting of a defense mistrial motion and the reversal of the district court's granting of petitioner's motion to dismiss the indictment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A10-A18) is reported at 713 F.2d 579. The opinions of the district court (Pet. App. A1-A6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1983 and rehearing was denied on September 28, 1983 (Pet. App. A7-A9). The petition for a writ of certiorari was filed on November 28, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner and several co-defendants were indicted by a grand jury in the Western District of Oklahoma. Petitioner was charged with one count of operating an illegal gambling business, in violation of 18 U.S.C. 1955; one

count of traveling in interstate commerce and using interstate facilities with intent to promote, manage, and facilitate an unlawful activity, in violation of 18 U.S.C. 1952; and one count of transmission in interstate commerce of wagering information, in violation of 18 U.S.C. 1084.[1] After the fifth day of a jury trial and before the government had completed presentation of its case, the district court granted a defense mistrial motion based upon "repeated violations" by government witnesses of the court's sequestration order, entered pursuant to Fed. R. Evid. 615 (Pet. App. A1-A2). The defendants then moved to dismiss the indictment on the ground that retrial would violate the Double Jeopardy Clause of the Fifth Amendment.[2] The district court granted these motions and dismissed the indictment (Pet. App. A3-A6). The government appealed, pursuant to 18 U.S.C. 3731, and the court of appeals reversed (Pet. App. A10-A18).

The mistrial was based on two alleged violations of the sequestration order by FBI agents. The facts surrounding these incidents are recounted in detail in the court of appeals' opinion (Pet. App. A12-A14). Briefly, the first incident concerned Agent James Hawkins, who testified about a search of petitioner's residence that had been carried out more than three years earlier. Hawkins was asked

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[1]Petitioner and co-defendant William Gibbs were named in all three counts. Co-defendants Leroy Hines, Carla Hines, Anna Mae Hines, Paul Neal, Edward Harma, Donna Fogerty, and Mark Baron were charged with operating an illegal gambling business. Fogerty and Baron pleaded guilty, after the second day of trial, to a charge of transmitting wagering information, in violation of 18 U.S.C. 1084.

[2]Co-defendant Anna Mae Hines also moved to dismiss on the grounds that her Sixth Amendment rights to a speedy and public trial by an impartial jury and to confrontation and cross-examination of witnesses had been violated (Pet. App. A11). The district court granted that motion (*id.* at A6), but the court of appeals reversed (*id.* at A17).

on cross-examination if he had participated in a strip search at the residence, and Hawkins replied that he did not recall any strip search. Confronted with an FBI report indicating that such strip searches had taken place, Hawkins said that such searches might have occurred but that he did not participate in them and had no first-hand knowledge of them (Pet. App. A12-A13).

At a recess following the conclusion of his testimony Hawkins was asked by other FBI agents waiting to be called as witnesses why he had been so long on the witness stand. He then explained that there had been some question about the occurrence of strip searches at the Poe residence and his participation in them (Pet. App. A13).[3] Defense counsel overheard this conversation and promptly reported it to the district court, which conducted a hearing into the incident out of the presence of the jury. At the conclusion of the hearing, the defendants made a variety of motions. Petitioner moved for dismissal of the indictment (Tr. 806-808), and his co-defendants subsequently moved in the alternative to exclude the testimony of the affected witnesses or for a mistrial (Tr. 808-809).[4] After taking the matter under advisement, the court decided not to terminate the trial and instead instructed the jury that the violation of the sequestration order could be considered in assessing the credibility of Hawkins and those with whom he had conversed (Pet. App. A13-A14).

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[3]Other government witnesses later testified that two strip searches were in fact conducted at petitioner's residence and that nothing incriminating was discovered in either search. Neither of the persons searched was named as a defendant in this case (Pet. App. A13).

[4]The district court erroneously believed that granting the mistrial motion would bar retrial. Tr. 813-814. Thus, the court perceived no practical difference between that motion and petitioner's motion to dismiss. Tr. 813-814. It was apparently for this reason that the court never asked petitioner's counsel whether he joined the mistrial motion.

The next incident involved former agent Nanette Hittmeirer, who had participated in searches of the residences of co-defendants Carla Hines and Anna Mae Hines. A preceding witness had been asked on cross-examination whether any strip searches had been conducted at either of the Hines residences, and Hittmeirer testified that there was no strip search at either residence (Pet. App. A14).

On cross-examination, Hittmeirer was asked if she had discussed her testimony with anyone beforehand, and she answered that she had spoken very briefly with a supervisory FBI agent about possible areas of cross-examination. The supervisory agent had testified earlier in the case, but his conversation with Hittmeirer did not pertain in any way to his previous testimony, which concerned an entirely different aspect of the case (*ibid.*).

At this point, counsel for one of petitioner's co-defendants stated in the presence of all counsel: "I would renew our motion to dismiss or alternative motion for mistrial" (Tr. 1155). Counsel for one other co-defendant expressly joined the mistrial motion (Tr. 1158). The government argued that Hittmeirer had not violated the exclusion order.[5] The district court declined to order a mistrial, and Hittmeirer's testimony continued to its conclusion. After a weekend recess, however, the district judge declared a mistrial without hearing further argument. Later the defendants filed motions to dismiss, which the district court granted (Pet. App. A15).

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[5]The court of appeals noted that it is in fact unclear from the district court's order whether a witness was permitted to discuss with another, in advance of his testimony, the possible areas about which he or she might be questioned when called as a witness (Pet. App. A15).

2. The court of appeals reversed, finding that, whatever the merits of the district court's decision to grant a mistrial, it was error to have dismissed the indictment, because retrial would not be barred by the Double Jeopardy Clause. The court of appeals found applicable the general rule that where a defendant requests a mistrial, there is no bar to retrial. *United States* v. *Dinitz*, 424 U.S. 600, 607 (1976); *United States* v. *Tateo*, 377 U.S. 463, 467 (1964). The facts of this case, the court of appeals held, did not bring it within the exception to that rule, enunciated in *Oregon* v. *Kennedy*, 456 U.S. 667 (1982), for prosecutorial misconduct calculated to goad a defendant into requesting a mistrial. While there may have been careless behavior on the part of the government witnesses, the court of appeals held, it did not amount to intentional prosecutorial misconduct designed to provoke a defense request for a mistrial (Pet. App. A15-A17).

ARGUMENT

1. The court of appeals' decision is plainly correct, and petitioner's claims of error are all insubstantial. Citing *United States* v. *Jenkins*, 420 U.S. 358 (1975), petitioner argues (Pet. 8) that the court of appeals lacked jurisdiction to entertain the government's appeal because 18 U.S.C. 3731 does not authorize an appeal from a dismissal where, as here, a retrial would be required. Recognizing that *Jenkins* was overruled in *United States* v. *Scott*, 437 U.S. 82 (1978), which held that the government may appeal from a midtrial dismissal when it is procured by the defendant and does not constitute an acquittal, petitioner attempts to escape the application of *Scott* by pointing out that he did not request a mistrial. Petitioner admits, however, that he sought outright dismissal instead of a mistrial (Pet. 9), and it is clear that the declaration of a mistrial and dismissal were in no way based on a finding that the government had failed to establish its case. Thus, the situation here is precisely the same in all material respects as that in *Scott*.

2. Petitioner further argues (Pet. 6-8) that the government is barred from retrying him because the prosecutor erroneously answered in the affirmative when the district court asked whether he agreed with the court's view that declaring a mistrial would have the same effect for double jeopardy purposes as a dismissal (Tr. 813-814). Petitioner claims that he relied on the prosecutor's erroneous opinion and that the government's subsequent attempt to retry him violated due process. He contends that if the government had not conceded the double jeopardy issue, he would have actively opposed the mistrial ruling. Petitioner, however, overlooks the fact that he had already moved for dismissal before the prosecutor's statement was made (see Tr. 807-814). As a result, he can hardly claim now that he was depending on the prosecution's viewpoint in deciding whether to seek termination of the trial. In addition, since under *Scott* appeal and retrial would have been permissible had the court granted a dismissal, it does not appear that petitioner could have relied on the prosecutor's "concession" as an agreement that double jeopardy would bar further prosecution in either event, when the law was that it would be barred in neither, and the prosecutor's statement was fully consistent with that result.

In any event, unlike cases in which the government enters into a plea agreement or other contractual promise on which a defendant has a right to rely (see *Santobello* v. *New York*, 404 U.S. 257 (1971)), here the government did not enter into any stipulation or promise of any kind embodying the prosecutor's mistaken impression of law. The prosecutor merely gave his opinion about the legal consequences of the action the defense had sought. The defendant had his own attorney on whom he could call for legal advice. It is not customary for defendants to accept unquestioningly the prosecution's interpretation of the applicable law, and if they do so it must surely be at their own risk. As the court of

appeals stated in response to petitioner's argument, neither the courts nor the government is "bound by any such misconception of the law" (Pet. App. A18). See *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957).

3. Finally, petitioner maintains (Pet. 9-10) that the court of appeals erred in considering this a case where the mistrial was sought by the defense, because he himself did not move for a mistrial. He did, however, argue for dismissal, and he did so for the same reason that his co-defendants urged a mistrial. And as the court of appeals noted (Pet. App. A16 n.* (emphasis in original)), "when the district court declared a mistrial, there was *no* objection from *any* defendant. Under the circumstances, we deem Poe's absence of any objection to be at least tacit, if not outright, approval." Moreover, by initially moving for dismissal of the indictment, rather than first seeking a mistrial, petitioner merely sought in one step what his co-defendants sought in two. That petitioner chose this short cut surely makes no difference for double jeopardy purposes. Petitioner clearly relinquished his right to have the first trial concluded, and therefore the court of appeals was correct in applying the rule that where the defendant himself requests termination of the proceedings against him, the Double Jeopardy Clause is no bar to retrial unless judicial or prosecutorial misconduct had occurred that was intended to provoke the defense request. *Oregon* v. *Kennedy*, 456 U.S. at 672-673, 676. The court of appeals was likewise correct in concluding that there was absolutely nothing in the record to indicate an intent on the part of the government to provoke a mistrial request (Pet. App. A16). See *United States* v. *Wodtke*, 711 F.2d 86, 87-88 (8th Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

MARCH 1984

DOJ-1984-03